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No. _____

IN THE

Supreme Court of the United States

STATE OF MISSOURI,
Petitioner,

v.

CONRAD KRUSE JR.,
Respondent.

On Petition for a Writ of Certiorari
To the Missouri Court of Appeals, Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Fourth Amendment, is it reasonable for police officers to make a limited entry onto an individual's curtilage for the purpose of covering the rear exit of the home, while other officers conduct a "knock and talk" at the front door to investigate their probable-cause belief that the subject of an active arrest warrant is inside the home?

PARTIES TO THE PROCEEDING

Petitioner, State of Missouri, was the appellant below; respondent, Conrad Kruse Jr., was the respondent.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION..... 7

I. The Missouri Court of Appeals has adopted an unwarranted expansion of the rule in *Steagald* to limit law enforcement officers' ability to enter onto the curtilage of a person's home while engaged in legitimate law enforcement activities..... 7

II. The exclusionary rule is not intended to prevent the common police practice of covering the exits of a building, and by applying the rule in this case, the Missouri Court of Appeals has diminished a police officer's ability to protect both officer and public safety when executing arrest warrants on dangerous individuals. 22

CONCLUSION 27

APPENDIX

Order of the Missouri Supreme Court, on April 20, 2010, denying transfer A1

The Missouri Court of Appeals January 19, 2010 opinion A2

The petitioner's application for transfer.....A19

Excerpts from the trial transcript
and the legal file on direct appeal.....A34

TABLE OF AUTHORITIES

CASES

Alvarez v. Montgomery County, 147 F.3d 354 (4th Cir. 1998) 18
California v. Ciraolo, 476 U.S. 207 (1986) 11
Coolidge v. New Hampshire, 403 U.S. 443 (1971) ... 12
Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003) 17
Florida v. Riley, 488 U.S. 445 (1989) 11
Groh v. Ramirez, 540 U.S. 551 (2004) 11
Hardesty v. Hamburg Township, 461 F.3d 646 (6th Cir. 2006) 13, 18
Herring v. United States, 129 S.Ct. 695 (2009) 22, 23, 24, 25
Horton v. California, 496 U.S. 128 (1990) 12
Hudson v. Michigan, 547 U.S. 586 (2006) 9, 25
Illinois v. McArthur, 531 U.S. 326 (2001) 11, 14, 15
Katz v. United States, 389 U.S. 347 (1967) 10, 12
Michigan v. Summers, 452 U.S. 692 (1981) 13, 24
Oliver v. United States, 466 U.S. 170 (1984) 9
Payton v. New York, 445 U.S. 573 (1980) 7, 9
Steagald v. United States, 451 U.S. 204 (1981) .....passim

United States v. Johnson, 561 F.2d 832 (D.C. Cir. 1977) 18

United States v. Acosta, 965 F.2d 1248 (3d Cir. 1992) 25

United States v. Amuny, 767 F.2d 1113 (5th Cir. 1985) 9

United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977) 13, 18

United States v. Cavely, 318 F.3d 987 (10th Cir. 2003) ..... passim

United States v. Cisneros-Gutierrez, 598 F.3d 997 (8th Cir. 2010) 25

United States v. Daoust, 916 F.2d 757 (1st Cir. 1990) 13, 17

United States v. Dunn, 480 U.S. 294 (1987) 8, 10

United States v. French, 291 F.3d 945 (7th Cir. 2002) 18, 26

United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993) 13

United States v. Hammett, 236 F.3d 1054 (9th Cir. 2001) 18

United States v. Haqq, 278 F.3d 44 (2nd Cir. 2002) 9

United States v. Hayes, 551 F.3d 138 (2nd Cir. 2008) 11

United States v. Hedrick, 922 F.2d 396 (7th Cir. 1991) 10

United States v. Knight, 451 F.2d 275 (5th Cir. 1971) 18, 26

United States v. McMullin, 576 F.3d 810 (8th Cir. 2009) 25

United States v. Raines, 243 F.3d 419 (8th Cir. 2001) 13, 18

United States v. Reyes, 283 F.3d 446 (2nd Cir. 2002) 17

United States v. Taylor, 458 F.3d 1201 (11th Cir. 2006) 18

United States v. Titemore, 437 F.3d 251 (2nd Cir. 2006) 10

United States v. Weston, 443 F.3d 661 (8th Cir. 2006) 13, 18, 19, 20

OPINIONS BELOW

The Missouri Court of Appeals opinion affirming the trial court's judgment, issued January 19, 2010, and reported at 306 S.W.3d 603 (Mo.App.W.D. 2010), is reprinted in the Appendix ("App.") at A2-A17.

The Missouri Supreme Court's order denying petitioner's application for transfer, issued April 20, 2010, is reprinted in the Appendix at A1.

JURISDICTION

The Missouri Court of Appeals, Western District, entered its judgment on January 19, 2010. The Missouri Supreme Court denied petitioner's application for transfer on April 20, 2010. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In *Steagald v. United States*, 451 U.S. 204 (1981), the Court held that, in the absence of consent or exigent circumstances, an arrest warrant, alone, is insufficient to allow police officers to enter the home of a person not named in the warrant to search for the named party. If officers wish to search the residence of a person not named in the arrest warrant, they must first obtain a search warrant for the residence unless they have consent or exigent circumstances justifying a warrantless entry.

This petition asks the Court to clarify whether the holding in *Steagald* extends beyond the boundaries of the home to preclude law enforcement officers from making a limited entry onto a defendant's curtilage to cover the rear exit of the residence and prevent the possible flight of a person named in an arrest warrant when officers have probable cause to believe the person named is within the defendant's residence.

After receiving information that Jeremy Beel had just been seen stealing anhydrous ammonia, law enforcement officers discovered that Mr. Beel had an active warrant out for his arrest. App. at A3. The warrant contained "caution indicators," meaning Mr. Beel was a potentially violent individual. App. at A3.

Officers were advised that Mr. Beel planned to use the anhydrous ammonia to manufacture methamphetamine at Ben Young's residence. App. at A3, A34, A38-A39. When officers were unable to locate anyone at Mr. Young's residence, they drove around to various locations known to be associated with the manufacture of methamphetamine in search of Mr.

Beel. App. at A4. One of these locations was respondent's home. App. at A4. When they arrived at the home, they observed Mr. Beel's van in the driveway, which was the same van he was seen driving in the theft of anhydrous ammonia earlier that evening. App. at A3-A4. They contacted other officers and formulated a plan whereby two uniformed officers would approach the front of respondent's residence, knock on the door, and seek consent to search the residence for Mr. Beel, while two other officers would cover the rear exit in the event that Mr. Beel was present and decided to flee. App. at A5.

The officers simultaneously proceeded to their assigned locations. App. at A5. But as the two officers approached the rear of respondent's residence via a well-worn path between the residence and a nearby storage shed, the shed door came "flying open," and respondent "came bolting out the door." App. at A5, A14. The officers immediately ordered respondent to the ground. App. at A5. When respondent burst forth, he left the door to the storage shed wide open. App. at A5. Inside the well-lit shed, officers observed various items associated with the manufacture of methamphetamine, as well as three other individuals – one of whom was Mr. Beel. App. at A5, A37.

The officers ordered everyone out of the shed and placed them under arrest. App. at A5. The officers conducted a protective sweep of the shed to ensure that all occupants were accounted for, and while doing so, observed more items involved in the manufacture of methamphetamine. App. at A5. The officers kept the individuals restrained while obtaining a search warrant for the storage shed and residence based upon the items viewed. App. at A5-

A6. Respondent was subsequently prosecuted for unlawful use of drug paraphernalia, first-degree trafficking, possession of methamphetamine, and possession of a methamphetamine precursor with the intent to manufacture methamphetamine. App. at A2-A3.

At trial, respondent, relying on the Court's holding in *Steagald*, sought suppression of all items seized on the basis that the officers had violated his Fourth Amendment rights when they entered his backyard without a search warrant. App. at A6, A41. Petitioner acknowledged that the officers did not have a search warrant or consent, and that the area they entered constituted curtilage, but petitioner further argued that the officers' entry was reasonable and that the intrusion on respondent's privacy was limited, such that his Fourth Amendment rights were not violated. App. at A41-A43. The trial court granted the suppression motion, finding that the officers covering the rear exit conducted an illegal, warrantless search that was not justified by consent or exigent circumstances. App. at A6, A8-A9. Petitioner appealed the trial court's ruling. App. at A6.

On appeal, the Missouri Court of Appeals affirmed, also relying on *Steagald*, and held that the officers violated respondent's Fourth Amendment rights when they entered his curtilage without a search warrant, consent, or exigent circumstances. App. at A9, A16. Petitioner filed an application for transfer to the Missouri Supreme Court, arguing that the Missouri Court of Appeals failed to conduct the proper balancing tests in determining both the reasonableness of the officers' conduct and the applicability of the exclusionary rule to these circum-

stances. App. at A20. The Supreme Court of Missouri denied petitioner's application for transfer. App. at A1.

Petitioner, State of Missouri, seeks review of the Missouri Court of Appeals decision because its opinion represents an unwarranted extension of the Court's holding in *Steagald*. The Missouri Court of Appeals, relying on *Steagald*, effectively precluded law enforcement officers' entry onto a person's curtilage for a legitimate law enforcement purpose, even though the entry involved only a minimal intrusion on respondent's privacy interest and was unconnected with a search of the property. But the Court's opinion in *Steagald* was based on the very specific privacy interests in the home itself and the violation of those interests by a warrantless search. Unlike the officers in *Steagald*, the officers in respondent's case did not enter the confines of respondent's home and were not conducting a search under the Fourth Amendment. Thus, *Steagald* should not be extended to these circumstances.

REASONS FOR GRANTING THE PETITION

I. The Missouri Court of Appeals has adopted an unwarranted expansion of the rule in *Steagald* to limit law enforcement officers' ability to enter onto the curtilage of a person's home while engaged in legitimate law enforcement activities.

In *Steagald*, the Court was called upon to answer the question of whether "a law enforcement officer may legally search for the subject of an arrest warrant *in the home* of a third party without first obtaining a search warrant." *Steagald*, 451 U.S. at 205 (emphasis added). In that case, officers – armed solely with an arrest warrant for a third party – forcefully entered the defendant's home and searched for the subject of the arrest warrant. *Id.* at 206. In reversing the denial of the defendant's suppression motion, the Court noted, "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 212 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). In requiring law enforcement officers to obtain a search warrant in addition to the arrest warrant, the Court focused on the sanctity of the home and the need for a warrant to justify entry in the absence of exigent circumstances:

> In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home

> to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.

Id. at 213.

Relying primarily upon *Steagald*, the Missouri Court of Appeals upheld the trial court's suppression of evidence discovered on respondent's property because the law enforcement officers that entered onto respondent's curtilage to cover a rear exit and prevent the possible flight of the subject of the arrest warrant had no search warrant for respondent's property. App. at A16. But the Missouri Court of Appeals decision is an unwarranted expansion of *Steagald*'s holding for two reasons. First, while curtilage is entitled to protection under the Fourth Amendment as part of the home, it remains distinct from the home itself and is not always treated as harboring the same expectations of privacy as the actual residential unit. Second, the Court's concern in *Steagald* was the potential that law enforcement officers might justify a warrantless search of a property where they had reason – but not probable cause – to believe that criminal activity was afoot under the authority of a third party arrest warrant. But that concern is not present where law enforcement officers enter the curtilage for a reason unconnected with a search of the property, as was done in respondent's case.

A. The Missouri Court of Appeals should not have extended *Steagald*'s reach beyond the boundaries of the home itself.

In *United States v. Dunn*, 480 U.S. 294 (1987), the Court reaffirmed its earlier holding from *Oliver v.*

United States, 466 U.S. 170 (1984), that "the Fourth Amendment protects the curtilage of a house[.]" *Id.* at 300. But "[t]he protection of the Fourth Amendment, by necessity, exists in degrees." *United States v. Haqq*, 278 F.3d 44, 54 (2nd Cir. 2002) (Meskill, J., concurring). And to that end, the Fifth Circuit noted that "[c]ourts have long recognized that individuals possess differing degrees of privacy depending upon the nature of the area examined." *United States v. Amuny*, 767 F.2d 1113, 1127 (5th Cir. 1985). "Of course, the Fourth Amendment provides individuals with the greatest protection in their homes." *Id.* And while curtilage is given Fourth Amendment protection, that protection is distinguishable from the protection afforded the sanctity of the home. "[P]rivacy and security *in the home* are central to the Fourth Amendment's guarantees as explained in our decisions and as understood since the beginnings of the Republic." *Hudson v. Michigan*, 547 U.S. 586, 603 (2006)(emphasis added). "[I]t is a serious matter if law enforcement officers violate the *sanctity of the home* by ignoring the requisites of lawful entry." *Id.* (emphasis added). "[T]he physical entry *of the home* is the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (emphasis added).

It was the focus on the sanctity of the home that led the Court to conclude in *Steagald* that a search warrant was required to search the home of a person not named in an arrest warrant. *Steagald*, 451 U.S. at 212-213. The Court identified the two separate but related interests protected by arrest warrants and search warrants. *Id.* at 213. While an arrest warrant "primarily serves to protect an individual from an unreasonable seizure," a search warrant "safeguards an individual's interest in the privacy of his home

and possessions against the unjustified intrusion of the police." *Id.*

And, in *Steagald*, the arrest warrant authorized officers only to seize the person named in that warrant; yet the officers sought to expand that authority to also permit entry into the home of a person not named in the warrant. *Id.* "[W]hile the warrant in this case may have protected [the subject of the arrest warrant] from an unreasonable seizure, it did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home." *Id.*

Here, unlike *Steagald*, the officers never entered the home, or even breached the threshold. Instead, they entered onto respondent's curtilage – an area neither discussed nor implicated in *Steagald*. While the boundaries of a residential dwelling are easily defined by the four walls, curtilage is not so easily defined and depends largely upon the steps a person has taken to assert a subjective privacy interest therein. *Dunn*, 480 U.S. at 301. Thus, courts have recognized that "[t]he mere intonation of curtilage ... does not end the inquiry." *United States v. Hedrick*, 922 F.2d 396, 399 (7th Cir. 1991). And "[t]erming a particular area curtilage expresses a conclusion; it does not advance Fourth Amendment analysis." *United States v. Titemore*, 437 F.3d 251, 258 (2nd Cir. 2006). Rather, the curtilage inquiry goes beyond merely the subjective assertions of a privacy interest; the asserted privacy interest must also be one society is prepared to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Therefore, it is "possible that an area might fall within the curtilage of the home, as that concept was defined at common law, but the owner or

resident may fail to manifest a subjective expectation of privacy in the area." *United States v. Hayes*, 551 F.3d 138, 146 (2nd Cir. 2008).

The Court has repeatedly held that certain subjective assertions of privacy in the curtilage are not assertions society is prepared to recognize as reasonable. *See e.g. Florida v. Riley*, 488 U.S. 445, 450 (1989) (warrantless aerial observation of curtilage from an altitude of a mere 400 feet not unreasonable under Fourth Amendment despite partially enclosed greenhouse, surrounding wire fence, and a posted "Do Not Enter" sign); and *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (warrantless aerial observation of curtilage not unreasonable under the Fourth Amendment despite the existence of both 6-foot and 10-foot privacy fences erected around the property). This stands in contrast to the privacy interest in the home itself, which is always treated as objectively reasonable. "[A]bsent exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant." *Steagald*, 451 U.S. at 214 n.7. Thus, because the Court's focus in *Steagald* was on the actual dwelling unit, as opposed to the appurtenant curtilage, the Court in *Steagald* did not address the question raised here. It is "searches and seizures *inside a home* without a warrant [that] are presumptively unreasonable[.]" *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (emphasis added). But, in situations like respondent's, where officers entered the curtilage and not the home, it is the reasonableness of the officers' actions that determines whether the Fourth Amendment has been violated. *See Illinois v. McArthur*, 531 U.S. 326 (2001). In short, because *Steagald* was directed to protecting the sanctity of the home, the Missouri

Court of Appeals reliance upon, and extension of, *Steagald* to find a violation of the Fourth Amendment based upon an intrusion onto the curtilage was unwarranted.

B. The Missouri Court of Appeals should not have expanded *Steagald*'s holding to cover law enforcement actions independent of searches.

In addition, the rule of *Steagald* should be applied only if the officers' entry onto respondent's curtilage can properly be considered a "search" under the Fourth Amendment. *Steagald*, 451 U.S. at 212; *United States v. Cavely*, 318 F.3d 987, 993 (10th Cir. 2003). The Court has held that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz*, 389 U.S. at 353. Here, because the mere entry onto respondent's curtilage did not constitute a "search," *Steagald* should not have been applied, and the Missouri Court of Appeals extension of *Steagald*'s reach to prohibit the officers' actions was unwarranted.

In other contexts, the Court has determined that when a law enforcement officer observes contraband in plain view where he has a "legitimate reason for being present unconnected with a search directed against the accused[,]" there is no Fourth Amendment violation. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *Horton v. California*, 496 U.S. 128, 135-136 (1990). Here, the officers were not attempting to locate the subject of the arrest warrant when they entered respondent's curtilage; rather, that purpose belonged to the officers conducting the

"knock and talk" at the front door of the residence.[1] App. at A37-A38. The officers' purpose in entering the curtilage was to cover the rear exit of the residence and prevent the possible flight of the subject based upon their experience that subjects with outstanding arrest warrants tend to flee upon discovering the presence of law enforcement officers. App. at A35-A36, A39-A40. The Court has already indicated that actions designed to prevent flight of suspects and minimize the risk of harm to officers constitute legitimate law enforcement activities. *See Michigan v. Summers*, 452 U.S. 692, 702 (1981). And, in accordance with *Coolidge* and *Horton*, lower courts have held that "[w]here a legitimate law enforcement objective exists, a warrantless entry into the curtilage is not unreasonable under the Fourth Amendment, provided that the intrusion upon one's privacy is limited." *United States v. Weston*, 443 F.3d 661, 667 (8th Cir. 2006).

Because the officers who entered the respondent's curtilage were not conducting a search, but instead were preventing flight and maintaining officer safety, the relevant question to be answered was whether their actions were reasonable. But the Missouri Court of Appeals wholly dismissed this question and instead extended the holding of

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[1] Many courts have held that the "knock and talk" exception will extend to justify minimal intrusions onto areas of the curtilage not normally accessible by the public because the law enforcement action is in pursuit of legitimate law enforcement objectives. *See United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990); *Hardesty v. Hamburg Township*, 461 F.3d 646, 654 (6th Cir. 2006); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977); *United States v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001); and *United States v. Garcia*, 997 F.2d 1273, 1279-1280 (9th Cir. 1993).

Steagald by finding that the officers lacked exigent circumstances to justify their warrantless entry onto the curtilage. But the Missouri Court of Appeals *per se* rule is not consistent with the Court's Fourth Amendment jurisprudence.

The "central requirement" of the Fourth Amendment "is one of reasonableness." *McArthur*, 531 U.S. at 330. In examining alleged Fourth Amendment violations, a reviewing court, "rather than employing a *per se* rule of unreasonableness," is to "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Id.* at 331. From the Fourth Amendment's perspective, it is the reasonableness of law enforcement conduct that matters. *Id.* at 335. "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Id.* at 330.

In *McArthur*, the Court identified four factors leading to its determination that the conduct of law enforcement officers in preventing the defendant from entering his home unaccompanied by an officer while a search warrant was obtained for the home was reasonable. *McArthur*, 531 U.S. at 331-332. Those factors were: (1) the police had probable cause to believe that contraband was located inside the defendant's residence; (2) the police had good reason to believe that, in the absence of their restraint of the defendant, that contraband would be destroyed before a warrant could be obtained; (3) the officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by neither searching nor arresting the

defendant prior to obtaining a warrant; and (4) the restraint employed was limited in time and scope. *Id.* The Court held, "[g]iven the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible." *Id.* at 333. The Court additionally noted that it could find "no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time." *Id.* at 334.

The same rationale applies to respondent's case. Here, like the officers in *McArthur*, the officers in respondent's case had probable cause to believe that the item sought (here, the third party) was present in respondent's home. App. at A16. Also like the officers in *McArthur*, the officers in respondent's case had "good reason to fear" (based upon their prior experience) that, absent their entry into respondent's backyard, the item would be lost or destroyed (i.e. the third party might escape by fleeing out the back door) upon notification that law enforcement was present. App. at A36. And, as in *McArthur*, the officers in respondent's case "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by walking into respondent's open back yard for the sole purpose of covering the rear exit while other officers sought consent to search from the residents. App. at A35-A36, A38, A40. As in *McArthur*, the officers did not conduct a search of either the shed or the home until a search warrant was obtained. App. at A6. Finally, like the restraint in *McArthur*, the officers' intrusion onto respondent's property was limited in both time and scope. The officers intended only to cover the back door to prevent the third party from fleeing

from the residence. App. at A36, A38-A40. In arriving at their location, the officers crossed no barriers, broke no locks, and opened no gates or doors. App. at A14, A43-A44. They simply walked a well-worn path, and, in the event that the third party was not present, they would have left the back yard without incident. App. at A37. Thus, under the Court's holdings in *Coolidge*, *Horton*, and *McArthur*, the officers' conduct in respondent's case was reasonable.

And, contrary to the Missouri Court of Appeals opinion in this case, *Steagald* should not be extended to prevent this kind of law enforcement activity. In requiring a search warrant in addition to an arrest warrant, in *Steagald*, the Court feared that "[a] contrary conclusion – that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant – would create a significant potential for abuse." *Steagald*, 451 U.S. at 215. "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances." *Id.* "Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.*

But the officers' actions in respondent's case do not demonstrate the type of abusive conduct *Steagald* sought to prevent. On the contrary, the officers were attempting to comply with *Steagald* by conducting a "knock and talk" and obtaining consent to search respondent's home for the subject of the arrest warrant. The officers' action in covering the

rear exit of the home was for the purpose of preventing flight, which in turn served the dual purposes of protecting both officers and society at large from the escape of a known violent felon that the officers had probable cause to believe was present. These were all legitimate law enforcement concerns, and the officers were acting within the scope of their duties in entering the backyard. Thus, because their actions were unconnected with a search for evidence of criminal activity by respondent (or anyone else), there was no Fourth Amendment violation.

C. Contrary to the Missouri Court of Appeals opinion, all of the federal circuit courts have held that warrantless entries onto curtilage for a legitimate law enforcement objective unconnected with a search are reasonable under the Fourth Amendment.

Further, by applying a *per se* rule of unreasonableness to an entry onto the curtilage of a home without first examining the purpose of the breach, the Missouri Court of Appeals has created a conflict between Missouri and all of the federal circuits.

In similar situations, where officers entered onto the curtilage of a home for a legitimate law enforcement purpose apart from conducting a search of the property, all of the federal circuits have determined that the law enforcement conduct was reasonable and, thus, did not violate the Fourth Amendment. *See Daoust*, 916 F.2d at 758 (to interview an occupant); *United States v. Reyes*, 283 F.3d 446, 465 (2nd Cir. 2002) (probation officers executing a home visit); *Estate of Smith v. Marasco*, 318 F.3d 497, 520 (3d Cir. 2003) (identifying possibly reasonable justifications as seeking to interview an occupant or

locate a third party); *Alvarez v. Montgomery County*, 147 F.3d 354, 358 (4th Cir. 1998) (investigating report of underage drinking party); *United States v. Knight*, 451 F.2d 275, 278 (5th Cir. 1971) (officers making general inquiry to substantiate informant's tip); *Hardesty*, 461 F.3d at 654 (investigating tip that minors were being served alcohol on the premises); *United States v. French*, 291 F.3d 945, 954 (7th Cir. 2002) (probation officer seeking to locate errant probationer at defendant's home); *Weston*, 443 F.3d at 667 (officers investigating reports of stolen vehicles on defendant's property); *Anderson*, 552 F.2d at 1300 (officers looking for an individual to question him about a recent theft); *Raines*, 243 F.3d at 421 (officer attempting to serve civil process on a third party); *United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir. 2001) (seeking to contact and interview occupants); *Cavely*, 318 F.3d at 994 n.1 (officers seeking to execute arrest warrant for third party); *United States v. Taylor*, 458 F.3d 1201, 1205 (11th Cir. 2006) (officers investigating suspicious 911 hang-up calls from that location); and *United States v. Johnson*, 561 F.2d 832, 850 (D.C. Cir. 1977) (investigating tip from informant of narcotic activity). But contrary to these decisions, the Missouri Court of Appeals simply applied a *per se* rule of unreasonableness, based upon *Steagald*, and upheld the trial court's exclusion of evidence.[2]

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[2] The Missouri Court of Appeals dismissed petitioner's reliance on cases like these when it purported to distinguish *Raines* by noting that the officer in that case "was merely serving civil process." App. at A13. But this alleged distinction does not compel a different legal conclusion, as serving civil process is simply another legitimate law enforcement activity unconnected with a search – like preventing flight – that justifies a warrantless entry onto an individual's curtilage.

While the Missouri Court of Appeals decision conflicts generally with several circuits, it conflicts specifically with the Eighth Circuit's holding in *Weston*, and the Tenth Circuit's holding in *Cavely*. In *Weston*, law enforcement officers went to the defendant's rurally located mobile home to investigate reports of stolen vehicles. *Weston*, 443 F.3d at 664. The defendant's property was fenced, and a gate blocked the driveway entrance near the highway; the home itself was not visible from the highway. *Id.* At the end of the driveway, there was a split-rail fence separating the driveway from the mobile home. *Id.* The mobile home was situated perpendicularly to the fence, shielding the front door and articles nearby from the view of a person at the end of the driveway. *Id.*

Upon their arrival, the officers entered the gate to the driveway, proceeded to the end of the driveway, and then walked past the split-rail fence to the home's front door. *Id.* The officers planned to conduct a "knock and talk" to question the defendant about the stolen vehicles and seek consent to search his detached garage. *Id.* at 664, 667. But on their way to the front door, the officers noticed some items believed to contain anhydrous ammonia. *Id.* at 664. This evidence, coupled with reports that the defendant's home had been involved in the manufacture of methamphetamine, led the officers to depart and seek a search warrant. *Id.* When searching pursuant to the warrant, officers discovered and seized evidence consistent with the manufacture and distribution of methamphetamine. *Id.* at 664-665.

The defendant sought to have the evidence suppressed based upon the officers' warrantless entry onto his curtilage when they entered the

driveway and proceeded to the front door of the residence, passing two fences along the way. *Id.* at 666. The government conceded that the property at issue was curtilage of the defendant's home. *Id.* at 666. Nevertheless, the trial court denied the defendant's motion, and the Eighth Circuit affirmed the denial. *Id.* at 666-667. Consistent with this Court's holding in *McArthur*, the Eighth Circuit declared that "[t]he issue, then, is whether the officers' entry was reasonable." *Id.* Finding that the intrusion was limited and reasonably necessary to further a legitimate law enforcement purpose, the Eighth Circuit held that the law enforcement action was reasonable and did not violate the defendant's Fourth Amendment rights. *Id.*

In *Cavely*, law enforcement officers, armed with an arrest warrant for a third party, went to the defendant's residence to search for the subject of the warrant. *Cavely*, 318 F.3d at 992. The officers' belief that the subject of the warrant would be at the defendant's residence was based upon their knowledge that the subject was the former girlfriend of one of the defendant's associates, that she was a methamphetamine user, and that the defendant's residence had recently been searched for methamphetamine-related items. *Id.* When they arrived at the defendant's residence, two officers went to the front of the house, while a third officer went around toward the back. *Id.* Although no one answered the front door, the officer in back observed a man standing near the open door of a detached garage who then went into the house through the back door. *Id.* at 992-993. The officer observed through the open door of the garage various items associated with the manufacture of methamphetamine. *Id.* at 993. Based upon these observations, officers obtained a search

warrant and later seized evidence of methamphetamine manufacture. *Id.*

The defendant moved to suppress the evidence, arguing that his Fourth Amendment rights had been violated because officers had no reasonable grounds to believe that the subject of the arrest warrant would be present at his home. *Id.* at 992. The trial court denied the motion, and the Tenth Circuit affirmed the denial. *Id.* at 992-994. In affirming, the Tenth Circuit first noted the Court's holding in *Steagald* and held that "[t]he same rule would apply to a search of the curtilage of the home." *Id.* at 993.[3] But the Court indicated that "the material issue is not whether the officers had reason to believe that the woman might be at appellant's house; it is whether their entry upon appellant's property and their observations thereon constituted a 'search' within the meaning of the Fourth Amendment." *Id.* Finding that the burden was upon the defendant to establish a legitimate expectation of privacy in the area entered, the Tenth Circuit determined that the defendant failed to meet this burden. *Id.* at 993-994. The court held, "Absent a showing that the officers' entry on the property violated a reasonable expectation of privacy, their actions did not amount to a 'search' under the Fourth Amendment and their observations were a proper basis for a search warrant." *Id.* at 994. The court specifically noted that "[t]he mere fact that officers went to the front and around towards the back of appellant's house,

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[3] Although the Tenth Circuit indicated that *Steagald* applied equally to invasions of the curtilage, the court still employed the *McArthur* balancing test and found no Fourth Amendment violation. As discussed above, this petition questions whether the rule in *Steagald* should be extended to the curtilage of the home.

standing alone, does not establish an invasion of the curtilage." *Id.* at 994 n.1.

Here, by affirming the trial court's suppression of evidence inadvertently discovered by the officers in the respondent's back yard, the Missouri Court of Appeals created a conflict with the federal circuit courts regarding the analysis of warrantless entries onto curtilage.

II. The exclusionary rule is not intended to prevent the common police practice of covering the exits of a building, and by applying the rule in this case, the Missouri Court of Appeals has diminished a police officer's ability to protect both officer and public safety when executing arrest warrants on dangerous individuals.

In applying the exclusionary rule in this case, the Missouri Court of Appeals has placed police officers in a precarious position that effectively prevents them, in the common factual scenario present in this case, from exercising their legitimate authority to protect themselves and the public at large from dangerous individuals.

After finding the officers violated respondent's Fourth Amendment rights, the Missouri Court of Appeals applied the exclusionary rule to uphold the trial court's suppression of evidence. App. at A16-A17. But the Missouri Court of Appeals application of the rule was contrary to the Court's decision in *Herring v. United States*, 129 S.Ct. 695 (2009).

"[S]uppression is not an automatic consequence of a Fourth Amendment violation." *Herring*, 129 S.Ct. at 698. "Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* "[E]xclusion has always been our last resort, not our first impulse." *Id.* at 700.

Although the Missouri Court of Appeals acknowledged petitioner's argument that the exclusionary rule was inapplicable under the facts of this case, the Missouri court wholly failed to apply any of the underlying principles of the exclusionary rule. App. at A16-A17. Rather, the opinion merely noted that "the police . . . enter[ed] onto property as to which there was a privacy interest protected by the Fourth Amendment," and it then upheld the trial court's exclusion of the evidence.[4] App. at A16-A17.

In *Herring*, the Court outlined several "important principles that constrain application of the exclusionary rule." *Herring*, 129 S.Ct. at 700-701. "First, the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Id.* at 700. "In addition, the benefits of deterrence must outweigh the costs." *Id.* The Missouri Court of Appeals addressed neither the deterrent factor, nor the costs from application of the exclusionary rule as compared to any benefits from

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[4] The opinion also indicated that "the intention of the officers was a factual inference drawn by the trial court based on observing the testimony." App. at A17. The trial court had found that the officers' intent was "to prevent Mr. Beels from escaping if he was there." But in a conflicting finding, the trial court also determined that "the purpose of the officers that went to the back was to affect [sic] an arrest."

deterrence. And here, the exclusionary rule should not have been applied.

Historically, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." *Id.* at 702. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* The officers' actions in this case simply did not rise to that level. To the contrary, in conducting the common practice of covering the exits, the officers sought merely to protect themselves and the public.

There was no reason for the officers in respondent's case to believe that they were infringing on respondent's Fourth Amendment rights by covering the rear exit of his home. And certainly they harbored no intent to do so. Rather, their actions were meant to serve "the legitimate law enforcement interest in preventing flight," as well as "the interest in minimizing the risk of harm to the officers." *Summers*, 452 U.S. at 702. "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-703. Deterring such conduct does not promote the Fourth Amendment's interests in protecting privacy from unwarranted invasion. Rather, applying the exclusionary rule in this case has the undesired effect of deterring officers from taking the necessary steps to ensure swift apprehen-

sion of violent felons and protect both officer and public safety.

The officers' conduct in this case of covering a rear exit while other officers approached the front entrance is common practice. *See e.g. United States v. Cisneros-Gutierrez*, 598 F.3d 997, 1002 (8th Cir. 2010); *United States v. McMullin*, 576 F.3d 810, 812-813 (8th Cir. 2009); *Cavely*, 318 F.3d at 992, 994; and *United States v. Acosta*, 965 F.2d 1248, 1250 (3d Cir. 1992). Thus, the question presented in this petition is likely to arise again, and, in Missouri, the Court of Appeals decision will have an immediate widespread effect upon legitimate law enforcement activities.

Under *Herring*, the exclusionary rule is inapplicable in this context because there are no benefits to its application, but the costs are great. It not only results in letting a guilty defendant go free, "something that offends basic concepts of the criminal justice system," *Herring*, 129 S.Ct. at 701, but also serves to deter police conduct that should be encouraged and promoted.

Additionally, the discovery of the methamphetamine evidence in respondent's case was the result – not of the officers' entry into his backyard – but of respondent's action of charging out of his shed. While it is certainly true that respondent would not likely have done so but for the officers' presence, it is equally true that the officers would never have discovered the methamphetamine evidence had respondent not "bolted" out the door. And "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S.at 592. The Court has "never held that evidence is 'fruit

of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Id.* "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.*

Here, the discovery of the contraband was the direct result of respondent's actions. The officers testified that if they had discovered that the subject of the warrant was not present, they would have simply left the property. Their inadvertent discovery of the methamphetamine lab was not the product of the officers' exploitation of their entry onto respondent's property. "This is not a case where an overzealous law enforcement officer, without a warrant, intending to search for illegal activity ransacked every nook and cranny of [the defendant's] yard." *French*, 291 F.3d at 954. "Nor is it a case where a government agent snooped into areas that he reasonably believed to be private in hopes of uncovering evidence of a crime." *Id.* In short, "[n]othing in the officers' conduct when they entered the property can be considered a search." *Knight*, 451 F.2d at 278. Consequently, application of the exclusionary rule in this case was inappropriate.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 18, 2010

APPENDIX

TABLE OF CONTENTS

Order of the Missouri Supreme Court,
on April 20, 2010, denying transfer A1

The Missouri Court of Appeals
January 19, 2010 opinion A2

The petitioner's application for transfer A19

Excerpts from the trial transcript
and the legal file on direct appeal A34

In the Supreme Court of Missouri
SC90761
WD70481

January Session, 2010

State of Missouri,
Appellant,

vs. (TRANSFER)

Conrad Kruse, Jr.,
Respondent.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2010, and on the 20th day of April, 2010, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 20th day of April, 2010.

_____ Clerk

_____ D.C.

306 S.W.3d 603

In the Missouri Court of Appeals
WESTERN DISTRICT

STATE OF MISSOURI, Appellant,	)	
v.	)	WD70481
	)	OPINION FILED:
	)	JANUARY 19, 2010
CONRAD KRUSE, JR., Respondent.	)	

APPEAL FROM THE CIRCUIT COURT
OF PETTIS COUNTY
THE HONORABLE
ROBERT LAWRENCE KOFFMAN, JUDGE

Before Lisa White Hardwick, P.J., James M. Smart, Jr., and Alok Ahuja, JJ.

The State of Missouri appeals the grant of a motion to suppress physical evidence in a criminal case against Conrad Kruse. The State argues on appeal that the evidence should not have been suppressed. The judgment is affirmed.

Facts

Conrad Kruse was charged with two counts of possession of a controlled substance, section 195.202, one count of first-degree trafficking, section 195.222, one count of unlawful use of drug paraphernalia, section 195.233, and one count of possession of a

methamphetamine, section 195.233, and one count of possession of a methamphetamine precursor with intent to manufacture methamphetamine, section 195.246. Kruse filed a motion to suppress physical evidence resulting from the search of his home and storage shed. After a hearing, the motion was granted.

The following evidence, with the facts presented in the light most favorable to the trial court's ruling, was presented at the suppression hearing. On September 22, 2006, Officer Ron Finnell of the Mid-Missouri Drug Task Force, along with Officer Mark Morgan of the Pettis County Sheriff's Department, met with Deputy Ehlers of the Benton County Sheriff's Department. Deputy Ehlers informed the officers, based upon information he had received from a confidential informant, that an individual referred to as Jeremy Beel was involved in the theft of some anhydrous ammonia in Ionia, Missouri, and that Beel was planning to do a methamphetamine cook in Pettis County at a particular location. Officer Morgan had said that Deputy Ehlers's informants previously had provided accurate information. Ehlers provided a description of the van Beel would be driving, along with the license plate number. The van was registered in the name of Beel's father.

Officers Finnell and Morgan, in running a background check on Beel, discovered that he had an outstanding warrant. The warrant had "caution indicators," which meant that Beel was considered violent. The two officers then went to the location suggested in the tip to try to locate Beel's van. Upon arrival, they observed no evidence that Beel or anyone else was present.

The officers drove around, trying to "brainstorm" other locations where Beel might be. The officers believed that Beel would be unloading the anhydrous ammonia quickly, so they were looking in places known to be involved with methamphetamine. Officer Finnell suggested looking at the residence of Conrad Kruse who had previously violated the "nine[-]gram Sudafed law." Officers Finnell and Morgan had no information connecting Beel with Kruse.

When the officers arrived at Kruse's residence around 12:21 a.m., they observed the van registered to Beel's father. The van had a flat tire. There were several other cars on the driveway also. Kruse's property contained a mobile home that Kruse was using as his residence, a storage shed, and an abandoned trailer. There were "No Trespassing" signs posted near the front door of the residence and on the front door of the shed. The property was bordered by a wooded area on three sides and by Richardson Road on the fourth side. There were no obstructions to block access to the backyard. The storage shed was located at the end of the driveway, approximately thirty to forty yards from the road. The officers observed a light on in the shed. They had seen the light on at night before. The shed door was not visible from the road. The residence, a mobile home, had a back door, but it is not clear whether the officers knew at that time that the mobile home had a back door.

After verifying the license plate number of the van, the officers met up with two uniformed deputies a short distance away from Kruse's residence. The officers decided not to apply for a search warrant.

They formulated a plan whereby two uniformed deputies would approach the front door of the residence to make contact with the residents in an attempt to locate Beel. Officers Finnell and Morgan would go to the back of the residence to cover any rear door and the shed to prevent Beel from running away.

The officers split up. The two uniformed officers proceeded to the front door, and Officers Finnell and Morgan headed toward the back yard according to plan. At this point, none of the officers had requested or received consent to enter the property. As Officers Finnell and Morgan passed between the shed and the residence, and before the uniformed officers had a chance to knock on the front door, the shed door came "flying open," and Kruse "came bolting out the door." Officer Morgan ordered Kruse to the ground. When Kruse had come out of the shed, he left the door wide open. Officer Morgan observed another man and two women inside the shed. He also observed "various plastic jars and glasses with liquids in them, some of them had bi-phase liquids," and there was a hot plate. Officer Finnell moved toward the shed to cover the open door, and he also observed a man and two women inside the shed. The man identified himself as Beel. Officer Finnell ordered everyone out of the shed, and the three individuals complied.

Officer Finnell briefly glanced in the shed to verify that there were no other individuals present. While doing so, he noticed a "very elaborate system basically for manufacturing methamphetamine." After everyone was secured, the officers took pictures from the threshold of the shed to document what they were able to see. They did not move anything in

the shed, but they were able to smell chemical odors associated with the manufacture of methamphetamine.

At some point, Kruse's wife came out the back door of the residence, wanting to know what was going on. She, along with the others, was arrested on a twenty-four hour hold for the manufacture of methamphetamine. One of the uniformed deputies accompanied Kruse's wife back into the residence to obtain her cell phone, and while doing so, he observed a set of triple beam balance scales sitting "in plain sight" in the kitchen. Officer Finnell left to secure a search warrant for the property. After he returned with a warrant, the officers located and seized a variety of evidence associated with the manufacture of methamphetamine from both the shed and the residence.

Kruse filed a motion to suppress all of the evidence obtained from the search on the ground that the search violated his Fourth Amendment rights. Among other arguments, Kruse alleged that "[t]he seizure of Defendant Kruse and items on or about his person were fruit of a previous illegal and unconstitutional search of his property." Officers Morgan and Finnell testified at the suppression hearing. Following the receipt of trial briefs and a suppression hearing, the trial court granted Kruse's motion to suppress the evidence. The court found that the officers conducted a warrantless search of Kruse's backyard without the existence of exigent circumstances.

The State appeals.

Standard of Review

"Where a trial court has granted defendant's motion to suppress, 'we review the trial court's decision on appeal under an abuse of discretion standard ... [and] the decision will be affirmed unless it is clearly erroneous.'" *State v. McDonald*, 170 S.W.3d 535, 537 (Mo. App. 2005) (citation omitted). "Our review ... is limited to a determination of sufficiency of the evidence to sustain the trial court's finding." *State v. Kriley*, 976 S.W.2d 16, 19 (Mo. App. 1998). "We will defer to the trial court's findings of fact, but make an independent evaluation of the conclusions of law the trial court draws from its factual findings." *Id.* "Where there is no dispute as to the underlying facts, the determination of the reasonableness of a search and seizure, under the Fourth Amendment, is a question of law." *Id.* "We will view the evidence in the light most favorable to the decision of the trial court even though we may have weighed the evidence differently." *Id.* "When there is conflicting evidence, we will defer to the trial court's determination regarding the credibility of the witnesses, accepting or rejecting all, part, or none of the testimony it hears." *Id.* "If the trial court's ruling is plausible in light of the record viewed in its entirety, [the] court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.*

Analysis

The State argues that the evidence recovered from Kruse's mobile home and shed should not have been suppressed. It claims that the officers did not conduct a warrantless search. The State says that

the arrests were based on probable cause stemming from the officers' plain view of a methamphetamine lab on Kruse's property. It also states that the evidence Kruse sought to suppress was seized pursuant to a valid search warrant.

"The Fourth Amendment prohibition against unreasonable searches and seizures inherently acknowledges the sanctity of a person's home and extends protection to the curtilage of the home." *State v. Berry*, 92 S.W.3d 823, 829 (Mo. App. 2003). "The curtilage includes all out-buildings used in connection with the residence, such as garages, sheds, barns, yards, and lots connected with or in the close vicinity of the residence." *Id.* "A search or seizure that occurs on a person's premises without a warrant is presumptively unreasonable." *State v. Cromer*, 186 S.W.3d 333, 343 (Mo. App. 2005).

In essence, the State argues that the officers were not conducting a search and, instead, had a separate legitimate reason for being on Kruse's property (namely, to execute an arrest warrant and prevent the potential escape of Beel). Thus, argues the State, their entry was reasonable and did not violate Kruse's Fourth Amendment rights. Following this entry, the officers viewed a working methamphetamine lab in plain view, which provided them with probable cause to arrest the individuals present and to obtain a search warrant for the property. Because no evidence was seized and no search was conducted until a search warrant was procured, the State argues that there was no violation of the Fourth Amendment.

The trial court found that the officers entered onto Kruse's private curtilage, without a warrant, to

execute an arrest warrant on a non-resident third party. Kruse had a reasonable expectation of privacy in his backyard. The officers had no warrant and lacked consent to enter Kruse's property to search for Beel. The court found no reason to believe that Beel, if present, constituted a present threat to anyone at Kruse's residence. The trial court believed that exigent circumstances did not exist to bypass the warrant requirement.

Under the Fourth Amendment, law enforcement officers may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant only when there is consent or when "exigent circumstances" exist. *Steagald v. United States*, 451 U.S. 204, 206-06 (1981)(search of residence looking for the non-resident subject of an arrest warrant held a violation where no exigent circumstances). Exigent circumstances "include pursuing a fleeing felon, preventing the imminent destruction of evidence, preventing a suspect's escape, or mitigating the risk of danger to law enforcement or other persons inside or outside of the swelling." *Cromer*, 186 S.W. 3d at 344. "There is no absolute test for exigent circumstances; the determination that exigent circumstances are present is made on a case-by-case basis." *Id.* "In assessing circumstances to determine if they were exigent, the circumstances are evaluated on the basis of how they would have appeared to prudent, cautious and trained officers." *Id.* "The justification for the exigency exception is time related, i.e., there is a need that will not brook the delay incident to obtaining a warrant." *Id.* Several factors are considered when determining whether exigent circumstances exist. These factors include:

(1) a grave offense is involved, particularly a violent crime; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe the suspect committed the offense; (4) strong reason to believe the suspect is in the premises to be entered; (5) a likelihood the suspect will escape if not swiftly apprehended; (6) the entry, though not consented, is made peaceably.

Id.

"The plain view doctrine provides that anything an individual knowingly exposes to public view, even in his or her own home, involves no reasonable expectation of privacy and is not a subject of Fourth Amendment protection." *Kriley*, 976 S.W.2d at 19.

"[I]t is altogether proper for police with legitimate business to enter the areas of curtilage open to the public." *State v. Edwards*, 36 S.W.3d 22, 26 (Mo. App. 2000). "Accordingly, in the course of a criminal investigation, a law enforcement officer, without a warrant, is permitted 'to investigate a crime or to conduct official business at a residence in places where the public is invited.'" *Id.* at 26-27 (citation omitted). "[T]he key issue in determining the legitimacy of police entry into a particular area is whether the occupant of the premises has somehow exhibited a reasonable expectation of privacy in that area." *Id.* at 27. "'[W]hen the police come on private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (*e.g., walkways, driveways, porches)*, observations from such vantage points are not restricted by the Fourth Amendment.'" *Id.* (*quoting* 1 LaFave, *Search and Seizure*, § 2.3(f) & nn. 196-98 (1996)). "If in a parti-

cular case an occupant has taken effective steps to protect areas of the property from view and from uninvited visitors, then a privacy interest may be found in that area sufficient to preclude police from coming onto it for investigative purposes without permission." *Id.*

In *Kriley*, the police went to a home to speak with its residents about the contents of a trash bag found on the side of the road (the trash bag contained drug paraphernalia and a bill with the residence's address on it). 976 S.W.2d at 17-18. "Due to a large canine near the front entry of the residence," police officers "went to the rear of the residence, looking for an alternate entry." *Id.* at 18. "Once at the rear, they found a structure attached to the residence which enclosed an inner door which continued into the residence." *Id.* "Rather than knocking on the entry to the structure, [the officers] entered the structure, uninvited and without any exigent circumstances, and knocked on the inner door located inside." *Id.* As one officer was knocking, the other officer observed a clear glass mason jar containing a white powdery substance that smelled like methamphetamine. *Id.* A field test gave a positive indication the substance was methamphetamine. *Id.* Based on the apparent presence of methamphetamine, the officers obtained a search warrant. *Id.* A subsequent search revealed that the residence was an operating methamphetamine laboratory. *Id.* The trial court granted a motion to suppress the evidence seized from the search of the home. *Id.* at 19.

The court then considered "whether the structure attached to the residence was open to the public." *Id.* at 22. "In looking at all the factors, in a close case, we conclude that the occupants of the residence in ques-

tion closed off the area consistent with a reasonable expectation of privacy therein." *Id.* The court affirmed suppression of the evidence. *Id.*

Here, the State relied on *United States v. Raines*, 243 F.3d 419 (8th Cir. 2001), in arguing that the officers had the right to be in Kruse's back yard at the time in question. In *Raines*, a deputy sheriff went to the defendant's home attempting to serve civil process on another person believed to be present. *Id.* at 420. "After receiving no response at the front door but seeing several cars parked in the driveway, [the deputy] followed...procedure and proceeded to the back of the home believing the inhabitants might be outside on a summer evening and unable to hear him knocking at the front door." *Id.* The officer "walked through a ten-foot wide opening in a wall of debris that acted as a make-shift fence around the perimeter of the property." *Id.* There he observed a large number of marijuana plants growing. *Id.* The officer left and obtained a search warrant. *Id.* at 420-21. The trial court subsequently denied the defendant's motion to suppress evidence seized pursuant to the warrant. *Id.* at 421.

The defendant in that case argued that the deputy's "observation of marijuana plants growing in plain view while standing within the curtilage of his home constitute[d] a warrantless search in violation of the Fourth Amendment." *Id.* The United States Court of Appeals disagreed, finding that there was a ten-foot wide gap in the "fence of debris," that there were no "no trespassing" signs posted, and that the deputy's "limited intrusion was justified because he had the legitimate objective of locating [the person in question], who he had reason to believe was located at the residence, and serving her with civil process."

Id. It noted that courts have "previously recognized that law enforcement officers must sometimes move away from the front door when attempting to contact occupants of a residence." *Id.* The court found that the marijuana plants were in plain view and the officer was lawfully in the backyard. *Id.* at 421-22.

Raines differs from this case in certain respects. In *Raines*, the officer was merely serving civil process. It was his job to try to contact and serve the individual in question. There were no obvious assertions of a privacy interest in the property, and the "wall of debris" had a ten foot opening. Here, although the officers were purporting only to execute a warrant for Beel's arrest, the exigency to search Kruse's property in order to execute the arrest at 12:21 in the morning was not apparent.

In *Raines*, there were no exigent circumstances, but also there was no intent by the deputy sheriff to investigate the possibility of a crime in progress. Here, the officers would have believed that there might be criminal activity taking place, but there were no exigent circumstances and no search warrant. There was no apparent "need that will not brook the delay incident to obtaining a warrant." *Cromer*, 186 S.W.3d at 344.

It must also be noted that in *Kriley* and *Raines* the trial court reached different results in whether to suppress the evidence, but in each case the trial court ruling was affirmed. In close cases, some deference will be allowed the trial court in evaluating credibility and drawing inference. *See Kriley*, 976 S.W.2d at 19.

In this case, the police officers had substantial reason to believe that Beel was present. Though it was 12:21 a.m., they may have been permitted to knock on the front door and inquire whether Beel was present. Beel had an outstanding warrant that contained caution indicators notifying the officers that Beel was considered to be potentially violent. For the safety of the officers knocking on the door, the police presumably could have strategically positioned other officers in the front yard to provide protection. Alternatively, the officers could have knocked on the front door in the daylight, which would have been both safer and more likely to preclude escape by Beel. More significantly, the officers could have presented to a magistrate a persuasive request for a warrant to enter on the premises to search for Beel at any time of day or night.[1] The officers then, with the search warrant, could have "covered" the back yard while knocking on the front door.

The State argues that Kruse did not have an expectation of privacy in his backyard. The State notes that there were no gates or objects to hinder entrance into the backyard. Nothing obstructed a person's view into the back yard except the buildings. There appears to be a well-travelled route from the driveway to the rear of the property, marked by large pieces of wood resembling railroad ties. The two "no trespassing" signs were posted on doors, which the

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[1] The information they had, apparently from a reliable informant, was that Beel had stolen anhydrous ammonia. Kruse had a prior conviction for violating the law regulating the purchase of Sudafed. The van connected to Beel was in the driveway. There was a shed on the property.

State says implies that access was denied to the *interior* of the residence or shed without permission.

We cannot agree that there was no expectation of privacy in the backyard. The officers arrived at the Kruse residence after midnight. No exterior lights were on to welcome the public to come on the premises. The entrance to the residence is in the front yard. The "no trespassing" signs would ordinarily be understood to assert a privacy interest on the entire property. The back yard could not be seen from the road and was not in plain view. The back yard and backdoor were enclosed by trees on three sides and the home on the fourth side. In *Raines*, even though the back yard had a wall of debris serving as a make-shift fence, the intrusion was arguably less than in this case because it was daylight and the deputy sheriff was merely seeking to serve process. The trial court could have regarded the intrusion as reasonable under those circumstances.

This is not a case where the police officers merely knocked on the front door to ask whether Beel was present. The officers went into the back yard before trying the front door. The officers did not fear present danger or present destruction of evidence. When the officers arrived at Kruse's residence, they called for and took the time to wait for additional officers to arrive. Beel's van had a flat tire. Beel was presumably unaware of police presence, and his van was essentially immobile. Prior to the police entry into the back yard, Beel had no motive to flee or destroy evidence. The police acknowledged that the situation did not call for immediate action. The officers had time to seek a warrant to search for Beel. In the unlikely case the warrant were denied,

the officers still could have come back and knocked on the front door to ask about Beel.

The trial court found that there was no exigency. We cannot say that the trial court's judgment is clearly erroneous. *State v. Edwards*, 36 S.W.3d 22, 26 (Mo. App. 2000). We do differ with the trial court in that we would interpret the facts as pointing sufficiently to the presence of Beel on the premises as to support the issuance of a search warrant to find Beel. However, our difference with the trial court in that regard does not mean the court's ruling was "clearly erroneous." The police may have had probable cause to believe Beel most likely was present, but they did not have probable cause to believe a crime was in progress. In any event, "exigent circumstances" that do not otherwise exist cannot be provoked by officers violating privacy interests protected by the Fourth Amendment. *See, e.g., State v. Berry*, 92 S.W.3d 823 (Mo. App. 2003) (concluding that the fenced area behind the defendants' residence was curtilage to the residence, and police officers should not have entered the area without a search warrant). While under *Steagald*, 451 U.S. at 215-16, it is clear that officers may search for the subject of an arrest warrant in the home of a third party without a search warrant *if exigent circumstances exist*, here we cannot say that the trial court was required to regard these circumstances as exigent.

The State argues that this is not the kind of case that the exclusionary rule was meant to redress. The State argues that any possible violation of Kruse's Fourth Amendment rights was inadvertent because police officers did not intend to conduct a search. By entering into the back yard, the police were entering

onto the property as to which there was a privacy interest protected by the Fourth Amendment. Further, the intention if the officers was a factual inference drawn by the trial court based on observing the testimony.

Conclusion

Our review is only for an abuse of discretion; the decision will be affirmed unless it is "clearly erroneous." *McDonald*, 170 S.W.3d at 537. There is sufficient evidence from which the trial court could make factual findings to support the conclusion reached. *See Kriley*, 976 S.W.2d at 19. The trial court observed all the witnesses and drew inferences from the testimony. We cannot say the trial court ruling was "clearly erroneous."

The judgment is affirmed.

_____

James M. Smart, Jr., Judge

All concur.

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Appellant,	)	**Cir. Court No.**
	)	**06G2-CR01485-01**
	)	**Court of Appeals**
	)	**No. WD70481**
v.	)	**Supreme Court**
	)	**No. _____**
	)	
CONRAD KRUSE, Jr.,	)	**Court of Appeals,**
	)	**Western District**
	)	**Circuit Court for**
	)	**Pettis County**
Respondent.	)	

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _ or after opinion √.
The date the record on appeal was filed 1-21-2009
The date the Court of Appeals opinion was filed 1-19-2010
The date the motion for rehearing was filed 2-03-2010
and ruled on 3-02-2010
The date the application for transfer was filed in the Court of Appeals 2-03-2010
and ruled on 3-02-2010

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I. Questions of General Interest and Importance

1. When reviewing an alleged Fourth Amendment violation based upon law enforcement's warrantless entry onto private property, does a court employ a *per se* rule of unreasonableness, or must it balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable? This issue presents a question of general interest or importance because, in holding that the officers' actions in this case violated Respondent's Fourth Amendment rights, the Western District failed to employ the balancing test outlined in *Illinois v. McArthur*, 531 U.S. 326 (2001), to determine if the officers' actions were reasonable; instead, the court improperly employed a *per se* rule of unreasonableness to invalidate the officers' subsequent discovery and seizure of contraband.
Illinois v. McArthur, 531 U.S. 326 (2001).
Michigan v. Summers, 452 U.S. 692 (1981).
2. Upon finding a Fourth Amendment violation, must a court automatically exclude all evidence subsequently obtained, or is it to examine the culpability of the law enforcement conduct to discern whether the exclusionary rule is appropriate under the circumstances presented? This issue presents a question of general interest or importance because, in automatically applying the exclusionary rule, the Western District failed to evaluate the culpability of law enforcement conduct, as required under *Herring v. United States*, 129 S.Ct. 695 (2009), to determine if application of the exclusionary rule was appropriate under the circumstances presented in this case.
Herring v. United States, 129 S.Ct. 695 (2009).
Hudson v. Michigan, 547 U.S. 586 (2006).

II. STATEMENT OF FACTS

On September 22, 2006, Officer Ron Finnell of the Mid-Missouri Drug Task Force, along with Officer Mark Morgan of the Pettis County Sheriff's Department, met with Deputy Ehlers of the Benton County Sheriff's Department. Deputy Ehlers informed the officers, based upon information he had received from a confidential informant, that Jeremy Beel was involved in the theft of some anhydrous ammonia in Ionia, Missouri, and that Mr. Beel was planning to do a methamphetamine cook in Pettis County at Ben Young's residence. Officer Morgan had worked with Deputy Ehlers in the past, and Officer Morgan indicated that "he's never steered me wrong." Deputy Ehlers provided a description of the van Mr. Beel would be driving, along with the license plate number. The license number was traced to Mr. Beel's father.

Officers Finnell and Morgan ran a background check on Mr. Beel and discovered that he had an outstanding warrant. The warrant had "caution indicators," which meant that Mr. Beel was known to be violent. The two then went to Ben Young's residence to try to locate Mr. Beel's van. Upon their arrival, they noticed that there was no van at Mr. Young's residence, and "it was very quiet, no one moving around."

The officers drove around, brainstorming other locations where Mr. Beel might be. The officers believed that Mr. Beel would be unloading the anhydrous ammonia quickly, so they were looking in places known to be involved with methamphetamine. They first checked an old farmhouse on highway 52,

but there were no vehicles there and no sign that anyone had been there recently. Officer Finnell suggested looking at Respondent's residence, which was in the same general location as Mr. Young's residence and the old farmhouse. The officers did not have an arrest warrant for Respondent, but they decided to look at his residence based on the fact that Respondent had previously violated the "nine[-] gram Sudafed law."

The officers did not first seek a warrant for Respondent's property because they felt that they could knock on the door and simply ask the residents if Mr. Beel was present. If they discovered that he was not, they would have left the property. Likewise, if Mr. Beel had been present and surrendered himself, they would have taken him into custody and left without searching Respondent's property.

When the officers arrived at Respondent's residence around midnight, they observed a van, matching the description and license number provided, parked in Respondent's driveway with several other cars. Respondent's property contained an abandoned trailer, a mobile home that Respondent was using as his residence, and a storage shed. There were "No Trespassing" signs posted near the front door of the residence and on the front door of the shed. The property was bordered by a wooded area on three sides, and Richardson Road on the fourth side. There were no obstructions to block access to the backyard. The storage shed was located at the end of the driveway,

approximately 30-40 yards from the road.[1] The shed was located approximately six to eight feet from the rear corner of the residence. There was a light on in the shed, and the door was cracked, opening towards the back of the residence. The residence had a back door with a set of steps leading up to it.

After verifying the license plate number of the van, the officers met up with two uniformed deputies further up the road from Respondent's residence. They formulated a plan wherein the two uniformed deputies would approach the front door of the residence to make contact with the residents in an attempt to locate Mr. Beel while Officers Finnell and Morgan would go to the back of the residence to cover the rear door and the shed to prevent Mr. Beel's possible escape if he were present and decided to flee. Based on Officer Finnell's experience, "the majority of the time when a person has a warrant, when you knock on the door, they bail out the back door."

The officers split up, and the two uniformed officers proceeded to the front door, and Officers Finnell and Morgan headed towards the back yard. As Officers Finnell and Morgan passed between the shed and the residence, and before the uniformed officers had a chance to knock on the front door, the shed door came "flying open," and Respondent "came bolting out the door," directly at Officer Morgan. This caught Officer Morgan by surprise, and he ordered Respondent to the ground. When Respondent came out of the shed, he left the door wide open, and Officer Morgan observed another

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[1] The shed door was not visible from the road.

man and two women inside the shed. He also observed "various plastic jars and glasses with liquids in them, some of them had bi-phase liquids," and there was a hot plate. Officer Finnell moved towards the shed to cover the open door, and he also observed a man and two women inside the shed. The man identified himself as Mr. Beel. Officer Finnell ordered everyone out of the shed, and the three individuals complied.

Officer Finnell briefly glanced in the shed to verify that there were no other individuals present. While doing so, he noticed a "very elaborate system basically for manufacturing methamphetamine."

After everyone was secured, the officers took pictures from the threshold of the shed to document what they were able to see. They did not move anything in the shed, but they were able to smell chemical odors associated with the manufacture of methamphetamine.

At some point, Respondent's wife came out the back door of the residence, wanting to know what was going on. She, along with the others, was arrested on a 24-hour hold for the manufacture of methamphetamine. One of the uniformed deputies accompanied Respondent's wife back into the residence to obtain her cell phone, and while doing so, he observed a set of triple beam balance scales sitting "in plain sight" in the kitchen.

Officer Finnell left to secure a search warrant for the property. After he returned with a warrant, the officers located and seized a variety of evidence associated with the manufacture of methamphetamine from both the shed and the residence.

Respondent filed a motion to suppress all of the evidence obtained from the search, alleging that "[t]he seizure of Defendant Kruse and items on or about his person were fruits of a previous illegal and unconstitutional search of his property." The trial court granted Respondent's motion, finding that the officers conducted a warrantless search of Respondent's backyard when they entered to cover the rear exit. The State appealed.

III. DISCUSSION OF LEGAL ISSUES

A. The Western District's opinion failed to balance the privacy-related and law enforcement-related concerns to determine if the officers' actions were reasonable.

The Western District, after examining the facts in Respondent's case, determined that law enforcement's warrantless entry into Respondent's back yard, in the absence of either consent or exigent circumstances, constituted a Fourth Amendment violation. But in so holding, the court failed to analyze the reasonableness of the officers' actions in comparison to the minimal level of intrusion upon Respondent's privacy interest. The court simply analyzed whether exigent circumstances existed justifying the intrusion. And upon deciding that there was no exigency, the court employed a *per se* rule of unreasonableness and found a violation of the Fourth Amendment.

The "central requirement" of the Fourth Amendment "is one of reasonableness." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). In examining alleged Fourth Amendment violations, a reviewing court, "rather than employing a *per se* rule of unreasonableness," is to "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Id.* at 331. From the Fourth Amendment's perspective, it is the reasonableness of law enforcement conduct that matters. *Id.* at 335. "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the [United States Supreme] Court has found that certain general, or individual, circumstances may render a

warrantless search or seizure reasonable." *Id.* at 330. In this case, the Western District impermissibly applied a *per se* rule of unreasonableness to the conduct of law enforcement.

In *McArthur*, the Court identified four factors leading to its determination that the conduct of law enforcement in preventing the defendant from entering his home unaccompanied by an officer while a search warrant was obtained for the home was reasonable. *Id.* at 331-332. The factors included: (1) the police had probable cause to believe that contraband was located inside the defendant's residence, (2) the police had good reason to believe that, in the absence of their restraint of the defendant, that contraband would be destroyed before a warrant could be obtained, (3) the officers "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by neither searching nor arresting the defendant prior to obtaining a warrant, and (4) the restraint employed was limited in time and scope. *Id.* The Court held, "[g]iven the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible." *Id.* at 333. The Court additionally noted that it could find "no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time." *Id.* at 334.

The same rationale applies to Respondent's case. Here, the Western District determined that, like law enforcement in *McArthur*, the officers had probable cause to believe that the third-party was present in Respondent's home. *State v. Kruse*,

WD70481, memo. op. at 12 (Jan. 19, 2010). Also like law enforcement in *McArthur*, the officers in Respondent's case had "good reason to fear" (based upon their prior experience) that, absent their entry into Respondent's backyard, the third-party might escape by fleeing out the back door upon notification that law enforcement was present. And, as in *McArthur*, the officers in Respondent's case "made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy" by walking into Respondent's open back yard for the sole purpose of covering the rear exit while other officers sought consent to search from the residents. As in *McArthur*, the officers did not conduct a search of either the shed or the home until a search warrant was obtained. Finally, like the restraint in *McArthur*, the officers' intrusion onto Respondent's property was limited in time and scope. The officers intended only to cover the back door to prevent the third-party from fleeing out the back of the residence. In arriving at their location, they crossed no barriers, broke no locks, and opened no gates or doors. They simply walked a well-worn path, and, in the event that the third-party was not present, they would have left the back yard without incident. "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 702-703 (1981) (officers detained an occupant of premises being searched for contraband pursuant to a valid warrant).

The Western District's opinion failed to consider the reasonableness of the officers' conduct compared with the level of intrusion upon Respondent's property. And in failing to conduct this balancing test, the court applied a *per se* rule of

unreasonableness to the officers' actions, which is impermissible under *McArthur*. Consequently, transfer is appropriate.

B. The Western District's opinion improperly applied the exclusionary rule without consideration for the culpability of law enforcement conduct.

Had the Western District applied the proper balancing test and still reached a conclusion that a Fourth Amendment violation occurred, its opinion was nevertheless erroneous because it automatically applied the exclusionary rule without first determining if application of the rule was appropriate under these circumstances.

"[S]uppression is not an automatic consequence of a Fourth Amendment violation." *Herring v. United States*, 129 S.Ct. 695, 698 (2009). "Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Id.* "[E]xclusion has always been our last resort, not our first impulse." *Id.* at 700.

Here, while acknowledging the State's argument that the exclusionary rule was inapplicable under the facts of this case, the Western District's opinion failed to analyze that argument. Rather, the opinion noted that "the police . . . enter[ed] onto property as to which there was a privacy interest protected by the Fourth Amendment," and it upheld the trial court's exclusion of the evidence.[2] *Kruse*, memo. op. at 13.

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[2] The opinion also indicated that "the intention of the officers was a factual inference drawn by the trial court based on observing the testimony." *Kruse*,

The Court in *Herring* outlined several "important principles that constrain application of the exclusionary rule." *Herring*, 129 S.Ct. at 700-701. "First, the exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Id.* at 700. "In addition, the benefits of deterrence must outweigh the costs." *Id.* The Western District's opinion addressed neither the deterrent factor, nor the costs from application of the exclusionary rule as compared to any benefits from deterrence. And here, the exclusionary rule should not have been applied.

Historically, "the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional." *Id.* at 702. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* The officers' actions in this case simply did not rise to that level.

There was no reason for the officers in Respondent's case to believe that they were infringing on Respondent's Fourth Amendment

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memo. op. at 13. And the trial court found that the officers' intent was "to prevent Mr. Beels from escaping if he was there." But in a conflicting finding, the trial court also determined that "the purpose of the officers that went to the back was to affect [sic] an arrest."

rights by covering the rear exit of his home. And certainly they harbored no intent to do so. Rather, their actions were meant to serve "the legitimate law enforcement interest in preventing flight," as well as "the interest in minimizing the risk of harm to the officers." *Michigan v. Summers*, 452 U.S. 692, 702 (1981). Deterring such conduct does not promote the Fourth Amendment's interests in protecting privacy from unwarranted invasion. Rather, applying the exclusionary rule in this case would have the undesired effect of deterring law enforcement from taking the necessary steps to ensure swift apprehension of violent felons and protect the safety of law enforcement and the public at large. Under *Herring*, the exclusionary rule is inapplicable in this context because there are no benefits to its application, but the costs are great. Not only does it result in letting a guilty defendant go free, "something that offends basic concepts of the criminal justice system," *Herring*, 129 S.Ct. at 701, but also it serves to deter police conduct that should be encouraged and promoted, not deterred.

Additionally, the discovery of the methamphetamine evidence in Respondent's case was the result – not of the officers' entry into his backyard – but of Respondent's action of bursting forth from his shed. While it is certainly true that Respondent would not likely have burst forth but for the officers' presence, it is equally true that the officers would never have discovered the methamphetamine evidence had Respondent not burst forth. And "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S. 586, 592 (2006). The U.S. Supreme Court has "never held that evidence is 'fruit of the poisonous tree' simply because it would

not have come to light but for the illegal actions of the police." *Id.* "[T]he more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.*

Here, the discovery of the methamphetamine evidence was the direct result of Respondent's actions. The officers testified that if they had discovered that Mr. Beel was not present, they would have simply left the property. Their inadvertent discovery of the methamphetamine lab was not the product of the officers' exploitation of their entry onto Respondent's property. "[T]he exclusionary rule has no application where the Government learned of the evidence from an independent source." *Segura v. U.S.*, 468 U.S. 796, 805 (1984). Consequently, application of the exclusionary rule in this case was inappropriate.

Because the Western District automatically applied the exclusionary rule to an alleged Fourth Amendment violation, rather than balancing the potential deterrent effects against the costs to the criminal justice system, transfer is appropriate.

WHEREFORE, Appellant prays that this case be transferred to the Missouri Supreme Court pursuant to Rule 83.04.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Application for Transfer was mailed, postage pre-paid, this ____ day of March, 2010, to:

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TERENCE G. LORD,

Missouri Court of Appeals,
Western District
1300 Oak Street
Kansas City, MO
64106-2970

_____
JAYNE T. WOODS

[Trial transcript, pp. 23, beginning with line 12:]

DIRECT EXAMINATION BY MR. CHAPMAN RESUMED

Q. What did the deputy tell you?
MS. WARD: Subject to the objection I just noted.
THE COURT: You have a continuing objection on that particular point.
Q. (By Mr. Chapman) What did the deputy tell you?
A. [By Deputy Finnell] That anhydrous had been stolen, the suspect would be a Jeremy Beel, the van description, and where they thought it would possibly be going.
Q. What was the van description?
A. It was, I believe, an older model gray panel van.
Q. Was there a license number?
A. That, I do not remember.
Q. Okay. Were you told that - - that there was an outstanding warrant for Jeremy Beel?
A. Yes, sir.
Q. And did the deputy tell you that?
A. Detective Morgan told me that.
Q. Okay. All right. So after you met with Deputy Ehlers and learned the information about Jeremy Bell, what did you do? Where did you go?
A. We first went on to E Highway to a Ben Young's residence.
Q. What was your purpose in going there?
A. To see if we could locate the van. We had had information that they were manufacturing methamphetamine at that residence.

[Trial Transcript, pp. 32, beginning with line 2]
Q. Okay. What did you do after that?

A. Met with a deputy - - I believe it was Deputy Simons and a reserve deputy at the time, John Hammond, who's now a regular deputy.
Q. Where did you meet with them?
A. Further up the road.
Q. What did you do at that meeting?
A. Planned how we were basically going to try to - - when we came here, come in black, two uniforms could go to the front and Detective Morgan and I would go to the back to cover the rear door.
Q. And what was the purpose of going back?
A. Majority of the time a person that does have a warrant - -
Q. No, I'm sorry. What was the purpose of going back to this trailer?
A. Going back to try to attempt to locate Mr. Beel.
Q. Okay. And the plan was?
A. Two uniform officers go to the front door to make contact, Detective Morgan and I would go to the back to cover the back door and the outbuilding to make sure, you know, no one was out there or they didn't run out the back door.
Q. Okay. Did you and the two - - you and Morgan and the two uniform deputies, did you then go back to Mr. Kruse's trailer?
A. Yes, sir.
Q. Were the two uniform deputies, were they in the same car or were they in separate cars?
A. They were in the same car.
Q. Where did they go?
A. They went to the front door.
Q. Do you know where they parked?
A. I believe they probably parked down, say, in this area, trying to stay out of the view of the windows. (Witness indicates.)
Q. Okay. Where did you and Detective Morgan park?

A. We parked down here on the other side of the tree line.
Q. Okay. Did all four of you approach the trailer?
A. Yes, sir.
Q. Where did the two uniforms go?
A. Two uniforms went to the front door.
Q. Did you actually see them go there?
A. We were - - when we left, I saw them go in that direction. I never saw them get to the front door. We were trying to beat feet to the back to beat them to the door, because the majority of the time when a person has a warrant, when you knock on the door, they bail out the back door.

[Trial Transcript, pp. 36, beginning with line 9]
Q. As you passed the - - between that little gap there between the shed and the trailer, tell me what happened.
A. Mr. Kruse come out of the shed and confronted Detective Morgan.
Q. Where were you when that took place?
A. I was approximately right here at the edge of the shed.
Q. Okay. Right at the end of where - -
A. The edge of the house and the shed. I was right there. Detective Morgan was approximately here looking at the - - the back. (Witness indicates).
Q. Okay. And so when Mr. Kruse came out of the shed, what happened?
A. Detective Morgan put him down on the ground at gunpoint.
Q. What was said? I mean, what was - -
A. "Sheriff's department, on the ground."
Q. Did Mr. Kruse do that?
A. Yes.

Q. And when Detective Morgan did that, what did you do?
A. I came back around to cover the door that was left wide open.
Q. What was the lighting at the time?
A. It was well lit inside. It was very dark outside and well lit inside the building.
Q. All right. And when Mr. Kruse came out, did the door stay open or go back closed?
A. It stayed open.
Q. When you went to look - - when you went to look inside, what did you see?
A. A large gentleman sitting on what appeared to be a cooler with a larger female between his legs and another female standing watching.
Q. What did you do?
A. I ordered them out of the shed.
Q. Did they come out of the shed?
A. They all came out of the shed.

[Trial Transcript, pp. 68, beginning with line 19]
Q. Then when you got to Kruse's dwelling, why didn't you stake it and go get a search warrant at that time?
A. We felt if we could go to the door and knock to see if he was there, that would - - you know, they could say yes or no. If they said no - - if the say he's not there, then we're leaving. That was our plan. If they couldn't - - if no one would have came to the door or nobody said something, we would have left. I mean, that was our plan. No one answers, we leave. But even with No Trespassing, we feel we have the right to at least go to the door and knock on it.

Q. Well, let me as you this question: Your connecting Mr. Beel to Mr. Kruse you said had something to do with ephedrine hits, sales.
A. Yes, sir.
Q. How did you - - did you go to other people that had hits as well?
A. We went to Mr. Young's place. He was not there. We - - the house we went to on 52 was a known hangout where they would manufacture, do, and no one was there. So if - - we figured we would - - on our way back, we would just stop and try our luck. It was a shot in the dark.

[Trial Transcript, pp. 72, beginning with line 19]
Q. (By the Court) Now, I think I heard you say, quote, My job was to go to the shed. Is that right?
A. Yes, sir.
Q. I thought the job was for somebody to go to the front door and you were to prevent an escape?
A. We have two uniformed officers went to the front door.
Q. Two knock on the door and ask if this man is there.
A. Yes. Detective Morgan and I went out to the back to cover the outbuildings, because we don't want any surprises in the middle of the dark, and cover the back door. That way if they bail out the back - -
Q. I understand that, but your quote was, My job was to go to the house (sic). The shed is not the back door of the house.
A. The shed is at the back area of the house. Morgan - - I'm watching his back and he's watching mine. We're trying to cover the back area of the house.

Q. So the purpose of going to the shed wasn't to go and see if anybody was in the shed, it was to prevent exit of the house; is that your testimony?
A. If anyone exited from the shed, it prevented them from coming - - I'm trying to cover my officer that's in front of me. Detective Morgan is in front of me. I'm fanning back behind him.

[Trial Transcript, pp. 88, beginning with line 4]
Q. So what did - - so what did Ehlers tell you?
A. He told us Jeremy Beel's van had been down by the anhydrous tanks and had gotten some anhydrous and was going to do a cook in Pettis County.
Q. Did he tell you where in Pettis County?
A. He told us that it would be at Ben Young's place.
Q. Okay. Anything else that Ehlers told you that came from this informant?
A. Not that I recall.
Q. Okay. Who was with you at the time of the meeting with Deputy Ehlers?
A. The only people present was Deputy Ehlers, myself, and Detective Finnell from the drug task force.
Q. Okay. After the meeting with Ehlers, what did you and Finnell do?
A. Well, based on the information we had, we immediately went out to Ben Young's place to go see if we could locate the van.

[Trial Transcript, pp. 94, beginning with line 5]
Q. Okay. Did some uniformed deputies respond?
A. Yes.
Q. Who were they?
A. Deputy Mike Simons and Deputy John Hammond.
Q. Okay. Did you meet with those two?

A. Yes, we did.
Q. And did you formulate some sort of a plan about what you were going to do?
A. Yes, we did.
Q. What was your plan?
A. The two uniformed deputies would go to the front door while Task Force Officer Finnell and I would go to the back door.
Q. Was Deputy Ehlers going to have anything to do with what you were doing at Mr. Kruse's house?
A. No, sir.
Q. Mr. Kruse's house is in Pettis County?
A. Yes, it is.
Q. All right. And Ehlers is a Benton County deputy?
A. Correct.
Q. All right. So did the four of you, Hammond, Simons, Finnell, and you, go back to Kruse's house?
A. Yes, we did.
Q. Were - - how were - - how did Hammond and Simons get there?
A. They were in a marked patrol unit.
Q. Did they each have their own?
A. No. I believe they were riding together.
Q. All right. Where did they go?
A. They pulled directly behind us out front.
Q. And did they - - did they proceed toward the front door of the trailer?
A. Yes.
Q. And where did you go?
A. Deputy Finnell and I weaved our way through the vehicles that were in the driveway there and went to the back door between the shed and the mobile home.
Q. All right. When you went toward the back of the mobile home, what was your purpose of going there?
A. To catch anybody running out the back door.

Q. And were you side by side or one in front of the other, or how were you situated - - how were you arranged as you were going back there, you and Finnell?
A. I was in front and he was behind me.

[Excerpt from Defendant's Suggestions in Support of Motion to Suppress]
The entry into the backyard and shed of the Kruse property violated Conrad Kruse's Fourth Amendment rights. The evidence observed in "plain view" cannot be justified by attempting to execute an arrest warrant on Jeremy Beel. The officers were not justified in going into the back yard and shed because the Kruse's had exhibited an expectation of privacy particularly with NO TRESPASSING signs being in "plain view." Without the plain view evidence in the search warrant no probable cause existed to issue a search warrant for the Kruse residence and shed. All evidence seized as a result of the illegal entry must be suppressed.

[Excerpt from State's Suggestions in Opposition to Defendant's Motion to Suppress]
4. In our case, officers Finnell and Morgan unquestionably entered the "curtilage" of Conrad Kruse's residence. Just as unquestionably, the Fourth Amendment protects the curtilage as well as the home. Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed 2d 214 (1984). "The Fourth Amendment prohibition against unreasonable searches and seizures inherently acknowledges the sanctity of a person's home and extends protection to the curtilage of the home." State v. Schweitzer, 879 S.W. 2d 594, 596 (Mo. App. E. D. 1994).

5. But, to say that the Fourth Amendment protects the curtilage is not to say that it does so to the same extent or degree that it protects the home itself. This is common sense. My back yard, for instance, is fenced, like many others all over the country, and I would not expect to find strangers in my back yard without invitation, but my neighbors can easily see the whole thing, and most of it is clearly visible from the street to any member of the general public who took the opportunity to look. Plainly, I don't have the same expectation of privacy in my yard, even if it is the curtilage, as I do inside my home. "While the Fourth Amendment's protections do extend to curtilage areas appurtenant to or associated with a dwelling, this does not mean that police cannot enter a curtilage area without a warrant." State v. Edwards, 36 S.W. 3d 22, 26 (Mo. App. W.D. 2000). "Determinations as to the level of protection afforded an individual by the Fourth Amendment from governmental intrusion are inevitably contextually driven and require the Court to balance privacy rights against the government's interest in enforcing the law." State v. Kriley, 976 S.W. 2d 16, 21 (Mo. App. W. D. 1998). As the Court said in Edwards, supra at page 27, "If an occupant permits visitors to enter onto portions of the property, such as the driveway or front walk, so as to reach the door, or if such areas are visible from the outside property, then the occupant is generally held not to have a reasonable expectation of privacy in those portions of the property." Thus, while the curtilage is protected by the Fourth Amendment, it is not protected to the same extent as a person's home, and entry into one is not the same as entry into the other.

. . .

8. Applying the principles of the Bradshaw, Anderson, and Raines cases to our case, unquestionably, the Fourth Amendment was no impediment to the uniformed deputies' approach to the front door of the Kruse mobile home in an attempt to arrest Jeremy Beels on his outstanding felony warrant. As for Finnell and Morgan covering the back door, their purpose to prevent escape was legitimate, their plan was objectively reasonable, and the intrusion into the defendant's privacy was minimal. If no one had been home, or if Beels had come to the front door of the mobile home and been arrested, or if the occupants of the shed had stayed put and kept quiet, then Finnell and Morgan would have stood around the back yard for a few minutes doing nothing and then left. If Beels had exited the back door and tried to escape, Finnell and Morgan, presumably, would have caught him and taken him out to their patrol car and then to jail. In none of those scenarios would there have been an intrusion into the defendant's mobile home or shed and no search of anything. While it is true that the defendant placed a No Trespassing sign on the front of his shed, that sign was not placed in such a way as to warn people away from entering the back yard. In fact, that sign is not visible from anyplace other than the back yard. You can't see it until you're already there. A more reasonable interpretation of that sign, given its placement and location, is that it warns people away from entry into the shed. And the No Trespassing sign on the front of the mobile home, although it is clearly visible right next to the front door, does not warn people away from entry into the back yard. The defendant's back yard is not visible from the road, but the defendant took no affirmative action to limit entry into the back yard. No fence, no gate, no obstruction of any kind, and no signs placed

so as to give notice to anyone who might enter the back yard. Finnell and Morgan simply walked down a driveway and around the corner of the mobile home. In all three of the cases I cited, (Bradshaw, Anderson, and Raines) officers located evidence without any active involvement of the defendant. In our case, Finnell and Morgan would have found nothing without the defendant's help in charging out of his shed, leaving the door open and the light on. Finnell and Morgan did not enter the property to search for evidence; they entered to prevent the possible escape of Beel, for whom a felony warrant was outstanding. A warrant with caution indicators, in fact. So, balancing the defendant's privacy interest in his back yard against the obviously legitimate purpose and needs of the deputies in safely effecting the arrest of a felon, their entry into the defendant's back yard did not violate the Fourth Amendment.